Supreme Court, U.S.
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IN THE

Supreme Court of the United States

FULTON COUNTY, GEORGIA, ROBERT J. REGUS and MICHAEL G. COOPER,

Petitioners,

v.

CHESTER L. LAMBERT, WILLIAM E. MOWREY and JAMES M. HEATH,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether certiorari should be granted to resolve a conflict among the United States Courts of Appeal as to the standard for proper comparators in a disparate discipline employment discrimination case?

2. Whether certiorari should be granted to review the Eleventh Circuit's application of the doctrine of qualified immunity?

PARTIES TO THE PROCEEDING

***Petitioners*:**

Fulton County, Georgia
Robert J. Regus
Michael G. Cooper

***Respondents*:**

Chester L. Lambert
James M. Heath
Estate of William E. Mowrey

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PETITION FOR WRIT OF CERTIORARI

Petitioners Fulton County, Georgia, Robert J. Regus and Michael G. Cooper respectfully petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The opinion of the panel of the court of appeals in this case is reported at 253 F.3d 588, and is reprinted at Appendix B. One of the relevant orders of the United States District Court, Northern District of Georgia, is reported at 97 F. Supp. 2d 1380, and is reprinted at Appendix D; the other relevant order of the district court was not reported, but is printed at Appendix C. Citations to the trial transcript are denoted as, e.g., "Trans.—pp. 694-95." Citations to trial exhibits are denoted as "PE#" and "DE#."

RELEVANT STATUTORY AND CONSTITUTIONAL PROVISIONS

The Appendix reproduces relevant portions of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 1981 and 1983, and the text of Section 1 of the Fourteenth Amendment to the United States Constitution.

JURISDICTION

The Eleventh Circuit entered its opinion and order on June 6, 2001, and denied Petitioners' Petition for *Rehearing En Banc* on January 17, 2002. This Court has jurisdiction pursuant to 28 U.S.C. § 1254.

STATEMENT OF THE CASE

A. FULTON COUNTY EMPLOYEES INVOLVED IN THIS CASE

Beginning in December 1995, Petitioner Regus served as Fulton County's County Manager. (Trans.—pp. 1598:23-1599:2). As County Manager, Regus was the Chief

Executive Officer of Fulton County and had supervisory authority over all Fulton County employees. (Trans.—p. 1688:13-18). In 1995 and 1996, Petitioner Cooper served as Director of Fulton County's Office of Contract Compliance and Equal Employment Opportunity ("EEO Department") and reported directly to Regus. (Trans.—pp. 1520:4-8; 1520:24-1521:1). In this position, Cooper was responsible for investigating discrimination complaints lodged against Fulton County by its employees, preparing reports of his investigative findings and recommending corrective action if appropriate. (Trans.—pp. 1600:8-13; 1642:5-9; 1704:21-25).[1]

From August 1995 through mid-May 1996, Mozell Acey served as Human Resources Coordinator on the Department of Public Works' staff and was not in Respondents' chain of command. (Trans.—pp. 1014:22-23; 1015:14-16; 1110:25-1111:3; 1114:4-13; 1366:6-9). As Human Resources Coordinator, Acey interacted with the EEO Department in responding to complaints of discrimination filed by employees. (Trans.—pp. 1170:13-1171:9).

Respondent Lambert began his employment with Fulton County in 1975. In 1995 and 1996, he held the position of Civil Engineer III, and was responsible for the North Fulton water system and water and sewer maintenance. (Trans.—pp. 521:10-13; 522:2-9). Respondent Mowrey began his employment with Fulton County in 1989. In 1995, he became Area Construction Supervisor, Operations Manager, and was responsible for maintaining and constructing sewer lines for the South Fulton (Camp Creek) and North Fulton (Big Creek) waste water treatment facilities. (Trans.—pp. 223:25-224:1; 224:15-21; 226:6-20). Respondent Heath began his employment with Fulton County in

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[1] It was not disputed at trial that Cooper had no authority to discipline Respondents or the other employees involved in the Big Creek situation. (Trans.—pp. 1238:24-1239:3).

December 1988 as a supervisor in the Department of Public Works, and in 1995, he became acting supervisor at Big Creek. (Trans.—pp. 744:24-25; 747:6-12). Mowrey reported to Lambert and supervised Heath. (Trans - pp. 225:10-12; 336:3-13, 22-24; 1015:7-10). Heath, in turn, supervised two field supervisors: Mark Collett (white) and Curtis Brown (African American). (Trans.—p. 593:19-24). In these positions, each of the Respondents was responsible for, among other things, responding to employee complaints of racial harassment. (Trans.—pp. 627:3-7; 649:15-17; 864:17-865:7).

B. RACIAL INCIDENTS AT BIG CREEK

Racial slurs creating hostile environment for African American employees and Respondents' inaction. By memorandum dated August 21, 1995, David Parker, an African American employee at Big Creek, complained to Lambert about, among other things, supervisors using racial slurs to and about subordinate employees. (Trans.—pp. 524:11-15; 525:5-10; PE#20). Lambert, however, did not investigate Parker's allegations or even speak with Parker or any other employees about the allegations. (Trans.—pp. 593:5-10; 616:12-14). In fact, the only thing Lambert did in response to Parker's memorandum was forward a copy of it to Heath who, in turn, drafted a response for Lambert. (Trans.—pp. 525:14-19; 526:1-37 PE#21; 761:24-762:8). Heath, however, did not speak to Parker or any other employees or otherwise investigate the allegations raised in the memorandum prior to drafting a response for Lambert. (Trans.—pp. 590:25-591:2; 593:11-14; 617:19-22; 881:4-15). In fact, Heath did absolutely nothing to find out if there was any substance to Parker's claims. (Trans.—p. 880:19-24).

Relying solely upon Heath's response and Mowrey's statement that he "knew of no other problems" at Big Creek, Lambert responded in writing to Parker's complaint. (Trans.

—pp. 528:22-529:9; 597:5-9; PE#22). As for Parker's complaints about supervisors using racial slurs, Lambert wrote:

> Each of us comes to the job from a different environment and background. It is natural to distrust those that are different from ourselves . . . No one enjoys criticism. In a situation where the supervisor and employee are of different races, criticism can easily be misinterpreted. The employee must ask himself, 'Is it because my supervisor is prejudiced against me or is it because I made a mistake that needs to be corrected?'

(Trans.—p. 610:8-19; PE#22). Other than this memorandum, Lambert took no action in response to Parker's complaints about the use of racial slurs by supervisors and did not follow up with Parker to see if his concerns had been addressed adequately. (Trans.—pp. 560:12-14; 592:14-17).

Respondents' inaction to racially inflammatory notebook. On September 14, 1995, Parker and Arthur Glass, another African American Big Creek employee, found a notebook in a truck used by Terry Adams, a white crew leader at Big Creek. (Trans.—p. 771:2-21; DE#2). By the time Heath arrived at work, Parker and Glass had summoned a police officer, and the four of them examined the notebook, which contained drawings of confederate flags, flames, a hangman's noose hanging from a tree over a tombstone that read "burn in hell", a hooded figure resembling a Klansman and racial slurs, including "FUCK YOU NIGGER." (Trans.—p. 771:22-24; DE#2). Heath copied the notebook and gave it to the police officer for investigation. (Trans.—pp. 771:24-772:10). Heath then called Mowrey and told him about the notebook. (Trans.—p. 261:1-9). Approximately two hours later, the police called and instructed Heath to come pick up the notebook, stating that it was an internal matter, not a matter for the police. (Trans.—pp. 363:11-15; 772:21-773:3). After discussing the notebook with Heath, Mowrey felt that its contents could create a hostile work environment. (Trans.—pp. 261:12-18; 363:16-18; 773:25-

774:4). Heath met with Adams and his crew (Travis Richey and Randy Moore, both of whom are white). Adams admitted drawing the flames, Richey admitted drawing the confederate flags and Moore admitted drawing the tree and noose. In response, Heath sent only Richey home to "defuse" the situation. (Trans.—pp. 774:8-23).

The next day, Mowrey contacted Lambert's superior, who instructed him to meet with the individuals responsible for the notebook. (Trans.—pp. 266:7-9; 267:1-5; 1293:7-10). On September 18, 1995, Mowrey and Heath met with Richey, Adams and Moore. (Trans.—pp. 267:18-21; 268:20-24; 774:24-775:7). The men gave written statements wherein they admitted making the drawings in the notebook, but denied writing any of the racial slurs. (Trans.—pp. 268:20-269:5; PE#24-26). Mowrey did not, however, interview either Parker or Glass about the notebook. (Trans.—p. 368:21-24). Despite the fact that several employees had access to the notebook before it was found by Parker and Glass, Mowrey did not interview any other employees. (Trans.—p. 368:11-20). In fact, other than speaking with Adams, Richey and Moore, Mowrey did not further investigate the notebook and never ascertained the identity of the individual(s) responsible for drawing some of the pictures and writing any of the slurs in the notebook. (Trans.—pp. 370:9-17; 375:1-5; 1369:6-10). Mowrey did not contact anyone in the County Attorney's office, the EEO Department or the Human Resources Department for assistance. (Trans.—pp. 378:23-379:6). Mowrey testified he had hoped the police would take care of interviewing employees, but admitted that the police had already returned the notebook and told Heath that they could not investigate. (Trans.—pp. 377:21-378:8).

Lambert, who was on vacation when the notebook originally was discovered, learned about it approximately one week later, but did not meet with any employees about the notebook or take any other action. (Trans.—pp. 541:18-542:2; 631:21-22; 638:14-16; 640:2-5). Furthermore, despite

his concern about the effect the notebook might have on the working environment, Lambert failed to contact anyone outside the department for assistance. (Trans.—pp. 637:9-13; 638:8-10; 639:21-640:1).

Racial graffiti and Respondents' inaction. In October 1995, Woody Bidwell, a supervisor who was filling in for Heath (who was out sick), informed Mowrey that a racial slur had been found on a break room wall at Big Creek. (Trans.—pp. 273:7-11; 390:18-24). Because this was the third incident involving racial slurs of which he was aware in three months, Mowrey was concerned that a pattern was developing. (Trans.—pp. 395:2-10). Nevertheless, Mowrey did not contact the County Manager's office or the EEO Department for assistance. (Trans.—pp. 396:6-15). Mowrey neither met with employees about, nor kept any documentation of, the incident. (Trans.—pp. 393:13-19). Mowrey instructed Bidwell to photograph and paint over the slur and to contact the police. (Trans.—pp. 275:2-14; 391:2-4). Mowrey subsequently sent an African American employee to paint over the racial slur. (Trans.—p. 394:12-16). Because the racial slurs continued, Mowrey admitted that whatever steps he had taken were ineffective in stopping them. (Trans.—pp. 407:16-17; 453:20-23).

Additional racial graffiti and Respondents' inaction. On January 11, 1996, Lambert met with Brown to discuss sewer surveillance work. (Trans.—p. 542:15-19). After the meeting, Parker approached Lambert and asked him what he was going to do about the racial problem at Big Creek. (Trans.—p. 542:19-21). Parker then showed Lambert two racial slurs in the break room—one on the wall and one on the door. (Trans.—pp. 275:17-24; 542:21-543:9). Although Mowrey and Heath had been aware of the writings, they had not informed Lambert. (Trans.—pp. 544:13-16; 642:9-14; 645:18-21; 649:12-14). Lambert believes that supervisors should communicate employee harassment complaints to

their superiors, and felt that Mowrey and/or Heath should have reported the slurs to him when they occurred and that their failure to do so was a mistake. (Trans.—pp. 646:4-7, 15-18; 647:1-6; 650:1-6). Later that day, Lambert told his superior, Frank Bockman, the Director of the Public Works Department, that there were still "serious racial problems at Big Creek." (Trans.—p. 545:11-16). Bockman instructed Lambert to meet with Mowrey and Heath and to thoroughly investigate the situation. (Trans.—p. 545:16-18).

The next day, Lambert met with Mowrey and Heath and ordered them to investigate the incidents and repaint the entire break room, because he felt that simply painting over the slur had been an inadequate response. (Trans.—pp. 276:6-9; 405:13-17; 544:2-9; 546:24-547:1; 651:15-19). Lambert never relieved Mowrey of responsibility for heading up this investigation. (Trans.—p. 688:17-19). Respondents' "investigation" of the incidents consisted of repainting the break room, replacing the door and talking about possibly installing surveillance cameras in the work place. (Trans.—pp. 410:12-14; 660:1-14). Respondents did not interview any employees, hold any group meetings with them to address the situation or attempt to find out who may have been responsible for the slurs. (Trans.—pp. 662:15-17; 662:25-663:2). Lambert testified that Respondents' response to the Big Creek situation prior to the installation of surveillance cameras in March 1996 was inadequate and, in retrospect, he believes that he should have done more. (Trans.—pp. 662:8-9; 663:3-6).

Additional racial slurs and Respondents' inaction. In early 1996, Glass complained to Heath that another employee had referred to him as a "sorry ass" black man. (Trans.—p. 805:3-8). Heath questioned the employee, who admitted that he "probably" said "something to that effect." (Trans.—p. 805:12-13). Heath did not discipline the employee for his admitted racial remark, but instead told him that it was

"inappropriate" and "would not be tolerated." (Trans.—pp. 805:14-15; 806:7-10). Although he would expect Heath to bring this to his attention, Mowrey was not aware of Glass' complaint to Heath or that a white Big Creek employee named Barry Woodall had been referred to as a "nigger lover." (Trans.—pp. 442:6-443:4). Bockman testified that although it is important to document employee complaints and that he expects his employees to keep him informed, he was unaware of these comments until he and Acey interviewed Woodall in March or April 1996. (Trans.—pp. 1397:4-1398:6; 1399:11-23). Lambert was also unaware of these comments and testified that the employees who made them should have been suspended and the manager who failed to report them to Lambert disciplined. (Trans.—pp. 655:12-656:5). Mowrey admits that this sort of comment creates a hostile work environment for all employees. (Trans.—pp. 443:5-12).

EEOC charges involving Big Creek facility. On January 26, 1996, Parker and Glass filed charges of discrimination with the United States Equal Employment Opportunity Commission ("EEOC"), which were received by the Department of Public Works sometime in February 1996. (Trans.—pp. 1196:20-1197:4; 1199:16-20; DE#15-16; 1300:24-1301:7; PE#53). According to Acey, this was the first she had heard about any problem with racial harassment at Big Creek. (Trans.—pp. 1200:19-1201:12). Bockman assigned Acey to coordinate the department's efforts to respond to the charges. (Trans.—pp. 1301:21-24). Acey met with Respondents on February 21, 1996, and asked each of them to write a report summarizing what had happened at Big Creek, when it had happened and how they responded. (Trans.—pp. 432:9-22; 547:2-15; 793:15-19; 794:3-12; PE#35; 1173:23-1174:8).

Additional racial slurs and Respondents' inaction. On or about February 16, 1996, another racial slur was found on the break room wall. (Trans.—pp. 277:2-3; 287:22-288:4;

781:25-782:9). Mowrey told Lambert about the slur, and Heath removed the time clock and locked the break room until it could be repainted. (Trans.—pp. 288:7-13; 412:11-13; 671:23-672:10; 782:10-13). Lambert did not suggest that Mowrey take any further action, such as meeting with the employees or contacting the Human Resources department. (Trans.—pp. 672:18-673:3). Instead, even though the police previously declined to investigate and had been ineffective thus far, Mowrey had Heath call the police. (Trans.—pp. 412:14-17; 413:9-12).

Additional racial slurs and Respondents' inaction. On or about February 19, 1996, Parker informed Heath that a letter and envelope containing racial slurs had been found on Parker's county vehicle. (Trans.—pp. 289:6-10; 784:12-20). Heath told Mowrey about the letter, and Mowrey instructed that the police be called to fingerprint the envelope and letter. (Trans.—pp. 289:10-12; 784:20-23; 785:5-7). However, neither Mowrey nor Heath further investigated the incident. (Trans.—pp. 420:15-421:15; 674:9-12). Moreover, although this was the sixth racial incident in six months, and Lambert had specifically instructed Mowrey to thoroughly investigate, Mowrey still had not met with the employees or contacted the EEO Department, County Manager's office or County Attorney's office for assistance. (Trans.—pp. 420:18-421:18).

Additional racial slurs and Respondents' inaction. On February 21, 1997, Parker found another racist note in a county van. (Trans.—pp. 290:8-12; 421:16-18; 674:19-24; 786:15-19). Mowrey contacted Bockman and the police, despite their previous inaction and ineffectiveness. (Trans.—pp. 674:25-675:16). Neither Mowrey nor Lambert took any other steps to respond to the incident, such as meeting with the employees to try to determine who had written the note,

or contacting other departments for help. (Trans.—pp. 420:21-421:15; 676:1-6).[2]

Cut brake line incident. On February 22, 1996, Parker and Glass complained that the brake line on their vehicle had been cut. (Trans.—pp. 300:20-301:12). Mowrey instructed Mark Collett to secure the vehicle, take it to Fulton County's vehicle service center to be inspected and contact the police. (Trans.—pp. 304:2-7). After having the brake line inspected, it was determined that the line had indeed been cut in four places, compromising the integrity of the line. (Trans.—pp. 303:5-304:10; 791:17-22; PE#32; 792:7-12).

Respondents' first meeting with Big Creek employees. On February 26, 1996, Bockman met with all of the employees at the Big Creek facility, including Respondents. Acey also attended. (Trans.—pp. 294:13-295:1; 789:12-21). At the meeting, Lambert stated that the racial incidents were in violation of Fulton County policy and would not be tolerated. (Trans.—pp. 684:18-25). Although racial incidents at Big Creek dated back at least as far as August 1995, this was the first and only meeting held by management at Big Creek with all the employees in attendance wherein racial harassment was discussed. (Trans.—pp. 428:9-22; 429:10-15; 1392:9-15).

C. INVESTIGATION OF THE SITUATION AT BIG CREEK

Cooper takes action. On February 15, 1996, Bockman forwarded copies of Parker's and Glass' EEOC charges to Cooper. (Trans.—pp. 1300:24-1301:11; PE#53; 1301:19-1302:1). Cooper instructed Bockman that the department needed to respond in writing by February 29, 1996, so that

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[2] According to Lambert, around this time, Respondents all began to suspect that Parker was responsible for the racial incidents. Respondents did not, however, make any efforts to confirm their suspicions. (Trans.—pp. 676:7-678:2).

the County Attorney's office could draft a response for the EEOC. (Trans.—pp. 1304:14-23; PE#71). Based on the written summaries Respondents had prepared for Acey, Acey drafted a memorandum for Bockman's signature, which was submitted to the EEO Department on February 29, 1996. (Trans.—pp. 1305:14-1306:7; 1306:11-20; PE#37). In the memorandum, Bockman admitted that efforts to control the situation at Big Creek had not been successful, but vowed to continue the investigation. (Trans.—PE#37). By letter dated March 4, 1996, Cooper forwarded Bockman's memorandum to then-County Attorney Susan Forsling, Esq., and requested that her office prepare a written statement of position to be submitted to the EEOC in response to Parker's and Glass' charges. (Trans.—pp. 1575:17-1576:12; PE#54).

In the meantime, the EEO Department conducted its own investigation of the Big Creek situation. (Trans.—pp. 314:10-12; 447:1-2; 552:17-22). Cooper and Tilford Belle, an EEO Department investigator, conducted numerous interviews with Public Works Department employees, some of which were tape recorded. (Trans.—pp. 1531:14-23; 1533:23-1534:4; 1537:16-18). Cooper and Belle also documented their investigation in writing. (Trans.—p. 1537: 13-15). At the conclusion of the EEO Department's investigation, Cooper sent Regus two reports of his findings. (Trans.—pp. 1518:3-5, 22-24; 1523:22-1524:1; PE#7).

Additional racial slurs and Respondents' response. On March 12, 1996, Curtis Brown found another racial slur written on a bathroom wall at Big Creek. (Trans.—pp. 686:21-25; 797:21-798:1). Heath had the slur photographed and removed and wrote two memoranda to Mowrey outlining his actions. (Trans.—pp. 799:5-18; PE#36; 801:21-802:7). Other than his memorandum to Lambert following Parker's August 1995 complaint and notes in his personal diary, this was the first written report by Heath of any of the race related incidents at Big Creek. (Trans.—pp. 445:25-446:4; Doc

185—Pg 687:15-22). By all accounts, whatever actions Respondents had taken in response to the Big Creek situation up to that point were ineffective in correcting the problem. (Trans.—pp. 688:24-689:9; 1421:4-9; 1426:18-21).

Beginning March 27, 1996, Bockman and Acey interviewed employees as part of the Department of Public Works' investigation of the racial incidents at Big Creek. (Trans.—pp. 1120:8-1121:7; DE#111; 1212:6-8; 1395:6-10). Acey prepared a report dated May 14, 1996, which summarized the interviews and recommended several measures for responding to any future allegations of racial harassment. (Trans.—DE#111). In particular, the report recommended that all future incidents be documented and communicated to the Human Resources Coordinator. (*Id.*). Acey made this recommendation because there had not been sufficient documentation of the Big Creek situation. (Trans.—p. 1396:16-19).

Other than the notebook, however, Bockman and Acey were unable to identify the person responsible for the racial incidents at Big Creek. (Trans.—pp. 1126:15-18; 1127:18-21). Acey also acknowledged that she did not think that the Big Creek employees had been truthful and forthright during the interviews and that the EEO Department investigation had uncovered facts that Bockman's and Acey's investigation had missed. (Trans.—pp. 1209:13-1210:4).

Regus takes action. Regus first learned about the Big Creek situation in April 1996, when the county's Director of Information and Public Affairs contacted Regus about a media request pertaining to the events at Big Creek.[3]

[3] During this investigation, Mark Winne, a reporter for WSB-TV, made an Open Records Act request for Cooper's report. (Trans.—p. 1685:16-25: DE#90). Denval Stewart, Esq., Assistant Staff Counsel in the County Attorney's office, responded to Winne's request and told him that the report could not be released because the situation at Big Creek was still under investigation. (Trans.—pp. 1406:21-1407:8; DE#92).

(Trans.—pp. 1599:24-1600:3; 1691:10-14, 20-21). Regus also learned at that time that Big Creek employees had filed EEOC charges and that Cooper and Bockman were each investigating the charges. (Trans.—pp. 1691:23-1692:9). Because both the acting department head (Bockman) and the Director of the EEO Department (Cooper) were investigating, Regus did not respond to the media request and took no action at that time. (Trans.—pp. 1600:8-13; 1692:7-9, 16-21).

Cooper's first report. Regus received Cooper's first report of his investigation on April 29, 1996. (Trans.—p. 1518:3-5). Regus did not show the report to anyone. (Trans.—p. 1702:23-25). On May 2 or 3, 1996, Regus received a copy of a May 2, 1996, letter from Denval Stewart to Bockman, forwarding a copy of a May 1, 1996, letter from Stewart to Cooper. (Trans.—pp. 1518:6-10, 13-15; 1606:20-23). Stewart's letter, which was prepared at Bockman's request on behalf of the Department of Public Works, addressed Bockman's concerns about Cooper's April 29, 1996, report. (Trans.—pp. 1320:3-17; PE#57; 1404:7-23; 1405:18-25; 1406:5-6; 1518:5-6, 15-17). In short, Stewart's letter stated that the Department of Public Works could not act on the facts and recommendations in Cooper's report and asked Cooper to complete the report by identifying the employees he believed had committed an act or omission that amounted to racial discrimination or harassment. (Trans.—PE#57). The letter also stated that the Department of Public Works was still conducting its own investigation. (*Id.*).

Cooper's second report. Regus subsequently asked Cooper to provide another report which "named names," and on May 3, 1996, Cooper submitted a revised version of his April 29 report. (Trans.—pp. 1518:22-24; 1523:21-1524:1; PE#7; 1586:15-19; 1606:4-7; 1704:1-6). In the May 3 report, Cooper identified individuals whom he believed either created the problems at Big Creek or allowed them to continue. (Trans.—p. 1524:6-9, 21-25). Cooper's report

recommended that some disciplinary action be taken, but did not recommend that any particular individuals be disciplined. (Trans.—pp. 1523:19-20). Regus did not make any disciplinary decisions upon receiving Cooper's May 3 report, because he wanted to wait for Bockman's report so that he could "hear both sides." (Trans.—pp. 1704:7-20).[4]

Because Fulton County was required by law to release the report, which had been requested by Winne pursuant to the Open Records Act, Regus sent a copy to the Fulton County Board of Commissioners on May 13, 1996, to apprize them of what was going to be produced to the media. (Trans.—pp. 1602:16-19; 1603:1-9; 1632:5-9; 1653:23-1654:3).

On May 3, 1996, after he had issued his revised report, Cooper received a copy of Stewart's May 1, 1996, letter. (Trans.—pp. 1518:17-18). On the same date, Cooper received a copy of the Department of Public Works' statement of position to the EEOC, which Stewart had drafted in response to Parker's and Glass' charges of discrimination, and forwarded it to the EEOC. (Trans.—pp. 1518:19-21). Although Cooper was aware that the statement of position contradicted the findings of his department's investigation, he did not view it as something he had to defend because it was written by Stewart, the Department of Public Works' attorney, who did not consult with Cooper prior to drafting the document. (Trans.—pp. 1558:19-25).[5] The EEOC conducted its own investigation into the matter and subsequently issued its determination that there was reason to believe that a

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[4] As Regus testified, Cooper was investigating as an officer of the county on behalf of Regus, whereas Bockman was preparing a report on behalf of the Department of Public Works. (Trans.—pp. 1704:21-1705:3).

[5] Stewart was the Public Works representative in the County Attorney's office and, in effect, "represented" the Public Works Department in legal matters. (Trans.—pp. 1302:23-25; 1303:22-24; 1405:18-21; 1703:9-15).

hostile work environment existed at Big Creek and that Parker's and Glass' complaints of racial harassment had not been addressed adequately. (Trans.—pp. 508:8-15; 1202:22-1203:14; DE#144-145; 1205:12-17; 1206:8-10; 1278:6-7).

Regus reviews the situation and acts. On May 14, 1996, Regus received Bockman's final report on the situation at Big Creek, and on May 17, 1996, he received Bockman's supplemental report, including a copy of Acey's memorandum and Respondents' written responses to Cooper's report. (Trans.—pp. 1326:12-1327:5; PE#39; 1330:24-1331:11; PE#118; 1610:12-14). After reviewing Bockman's report and Respondents' responses to Cooper's April 29 report, Regus was critical of Cooper's final report. (Trans.—p. 1705:16-18). Specifically, Regus believed that Cooper had deliberately excluded certain relevant facts. (Trans.—pp. 1657:11-14; PE#8; 1657:23-1658:15). According to Cooper, he did not include these facts because he felt that they were inadequate and ineffective to address the racial harassment at Big Creek. (Trans.—p. 1592:10-23).

Meeting regarding Big Creek. On May 15, 1996, Regus met with Deputy County Manager Sheila Pierce, Personnel Director Bob Brandes, Bockman, Cooper and County Attorney Forsling to discuss Big Creek and the results of Cooper's and Bockman's investigations. (Trans.—pp. 1337:9-17; 1341:5-10; 1695:14-19). The meeting was contentious, and both Cooper and Bockman were defensive of their respective reports. (Trans.—pp. 1694:1694:5-9; 1739:15-1740:5). At one point, Cooper told Bockman that he was looking at the situation at Big Creek from a white man's perspective and that he should look at it from the perspective of a black man who has had to work for a white man all his life. (Trans.—p. 1544:7-12). Although Regus viewed Cooper's conduct as being unprofessional, rude and accusatory, he did not view the comments as demonstrating any racial bias on Cooper's part. (Trans.—pp. 1665:23-

1667:8). Rather, Regus believed that Cooper was asking Bockman to understand him. (Trans.—p. 1667:1-4). Brandes felt that Cooper was "trying to protect his turf, trying to protect the integrity of what he thought was his work product," and was not expressing bias against whites. (Trans.—p. 1741:7-9, 14-16). Cooper testified that he made the statement because Bockman was focusing on his apparent belief that Parker and Glass were "drug dealers" rather than the fears of the African American employees at Big Creek. (Trans.—p. 1544:12-22).[6]

Regus' decision to discipline Respondents. Because Regus criticized Cooper's report and felt that it was incomplete, he put it aside and did not rely on it in disciplining Respondents. (Trans.—pp. 1417:23-1418:1; 1694:10-11; 1723:16-20). Instead, Regus relied on Bockman's report and tape-recorded interviews from Cooper's investigation. (Trans.—p. 1694:12-22). After reviewing this evidence, Regus determined that a hostile environment existed at Big Creek and that Respondents failed to take all necessary measures to stop the harassment. (Trans.—p. 1710:19-25). The next day, Regus met with Brandes and Forsling, but not Cooper, to determine the specifics of Respondents' discipline. (Trans.—pp. 1742:5-9, 13-22; 1743:16-1744:7). Brandes then helped Regus prepare Respondents' disciplinary letters. (Trans.—pp. 1744:17-19).

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[6] Specifically, Cooper believed that Bockman was focusing too much on a June 1995 incident in which Glass told Mowrey and Heath that Parker and Barry Woodall (white) had asked him to help them buy drugs to plant in Heath's truck. (Trans.—pp. 239:5-9, 21-25; 586:20-25; 756:16-757:1). In response to Glass' report, Mowrey and Heath had met with the police, but did not otherwise investigate the allegations. (Trans.—pp. 340:25-341:14; 890:9-11). Mowrey did not question Parker or Woodall about the allegations, and Bockman did not discipline either employee. (Trans.—pp. 345:15-23; 1360:12-18).

Respondents admitted at trial that a hostile work environment existed at Big Creek. (Trans.—pp. 453:17-19; 689:7-9; 931:9-11; 935:14-17). Respondents also admitted that between August 1996 and March 1996, whatever steps they took to end the racial harassment at Big Creek were ineffective. (Trans.—pp. 455:13-16; 463:2-8; 688:24-689:2; 719:24-720:5; 935:14-936:3). In fact, Lambert and Heath testified that aside from their opinions that Regus' conclusions were wrong, the discipline letters he issued to them were factually accurate. (Trans.—pp. 699:12-14; 936:15-23).

D. DISCIPLINE

Discipline of Respondents. By letters dated May 16, 1996, Respondents were disciplined for failing to effectively deal with the situation at Big Creek. (Trans.—pp. 318:24-319:7; PE#3; 566:23-567:1; PE#1; 1614:18-22; 1633:18-24; 828:22-25; PE#5). Lambert was discharged. (Trans.—PE#1). Mowrey was suspended for five days and demoted, with no resulting decrease in pay. (Trans.—pp. 233:17-20; 461:23-25; 515:2-4; 1661:22-23). Heath was demoted, with no resulting decrease in pay. (Trans.—pp. 1661:13-21; 829:4-9).

Regus did not consider disciplining Acey because she was not a part of the chain of command and, accordingly, did not have line responsibilities at Big Creek. (Trans.—pp. 1615:9-21). Neither Brown (African American) nor Collett (white), frontline supervisors at Big Creek, were disciplined. (Trans.—pp. 334:9-12; 431:9-23; 686:16-20).[7]

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[7] Although Cooper, through Belle, learned during his investigation that Brown had not reported drug use and weapons violations by Big Creek employees, Regus did not discipline Brown for this because that information was not in Bockman's report and Regus did not learn about Brown's inaction until trial. (Trans.—pp. 1579:10-22; 1580:6-22; 1581:13-23; 1582:12-19; 1617:16-1618:8; 1619:22-23).

Discipline of Cooper. On May 23, 1996, Regus reprimanded Cooper in writing for his actions during the May 15, 1996, meeting, the manner in which he investigated the allegations at Big Creek, his final report and for forwarding the statement of position to the EEOC without reconciling the apparent conflicts between it and his report. (Trans.—pp. 1521:9-13; 1523:5-7; 1536:12-19; PE#8). Regus did not discipline Cooper in connection with the hostile work environment at Big Creek because it was not in his department and, accordingly, he was not charged with maintaining or remedying the work environment. (Trans.—pp. 1614:23-1615:8).

Personnel Board's review of Respondents' discipline. Respondents appealed their discipline to the Fulton County Personnel Board. (Trans.—pp. 326:17-327:3). The Personnel Board, which was comprised of three citizens with no connection to Big Creek, found that the discipline imposed against Respondents was clearly job related, but reduced Respondents' discipline to 30-day suspensions. (Trans.—pp. 327:4-8; 464:8-14; 465:3-6; 465:22-466:23; DE#155; 572:8-10, 16-20; 713:10-14; DE#154; 832:19-25; PE#6; 834:14-17).

E. RESPONDENTS' RACE DISCRIMINATION CLAIMS

Respondents believe that race was a factor in their discipline because Regus disciplined white individuals (Respondents) but did not discipline Brown or Acey. (Trans.—pp. 468:11-15; 707:6-9; 916:21-917:1). Lambert and Mowrey testified, however, that Brown was a Sewer Supervisor under Heath and was never in charge of the investigation into the incidents of racial harassment at Big Creek. (Trans.—pp. 468:24-469:7; 707:10-12). Furthermore, Lambert admits that Acey was not in charge of the investigation into the incidents at Big Creek, and Mowrey testified that he and Acey had different job responsibilities altogether. (Trans.—pp. 470:4-12; 707:13-15). Acey testi-

fied that she has never worked at Big Creek, nor has she ever been responsible for the employees who work there, and that her job is totally different from those of Respondents. (Trans.—pp. 1182:20-1183:3; 1183:24-1184:2; 1186:18-23; 1187:1-15; 1192:4-13).

F. PROCEEDINGS BELOW

On May 1, 1997, Respondents filed this action against Petitioners in the United States District Court for the Northern District of Georgia, Atlanta Division. Petitioners alleged that Respondents imposed disparate discipline against them on the basis of their race (white), in violation of, *inter alia*, 42 U.S.C. § 2000e ("Title VII"), the Fourteenth Amendment to the United States Constitution (through 42 U.S.C. § 1983) and 42 U.S.C. § 1981. Subject matter jurisdiction in the district court was premised upon 28 U.S.C. § 1331. The case proceeded to trial before a jury in April and May 2000 on the Title VII race discrimination claims against Fulton County, and the Section 1981 and 1983 race discrimination claims against Regus and Cooper in their individual capacities.

After the close of Respondents' case-in-chief, Petitioners moved for judgment as a matter of law pursuant to Fed. R. Civ. P. 50(a), which the court denied. At the close of all the evidence, Petitioners moved the court not to strip Regus and Cooper of qualified immunity and for judgment as a matter of law pursuant to Fed. R. Civ. P. 50(a). The court denied Petitioners' Rule 50(a) motion, but reserved ruling on the question of qualified immunity pending the jury's responses to special interrogatories.

On May 5, 2000, the jury returned a verdict for Respondents, and awarded each back pay and compensatory damages against Fulton County on the Title VII claims, and compensatory and punitive damages against Regus and Cooper on the Section 1981 and 1983 claims. Petitioners again asked the court to rule on their motion to assert the qualified

immunity defense on behalf of Regus and Cooper and for judgment as a matter of law as to the award of punitive damages. The court denied Petitioners' motion as to qualified immunity in light of the jury's verdict and reserved ruling on the punitive damages issue pending the parties' submission of briefs. (Trans.—p. 1890:4-9). In their brief, Petitioners again argued that Cooper and Acey were not proper comparators to Respondents, and that the district court erred in allowing the jury to consider them as comparators, because neither had the same job responsibilities as Respondents, was in Respondents' chain of command or engaged in nearly identical conduct to Respondents.

On May 25, 2000, the district court denied Petitioners' motion for judgment as a matter of law as to punitive damages. In its order, the district court rejected Petitioners argument that the jury was not entitled to consider Cooper as a comparator to Respondents for disparate treatment purposes. The court held that "It was, and is, the Court's view that nearly identical conduct is not the only standard for making a comparison in a disparate discipline case. This case is a good example of the necessity for a 'comparable seriousness' standard." (App., p. 22a). On June 13, 2000, Petitioners timely renewed their motion for judgment as a matter of law pursuant to Fed. R. Civ. P. 50(b). In its order denying Petitioners' motion, the district court stated

> Defendants again argue that the Court erred in charging that the jury could compare other employees whose misconduct was "nearly identical or of comparable seriousness." It appears that the Court charged the jury more favorably to Defendants than it should have in light of the recent decision of the Eleventh Circuit in *Alexander v. Fulton County*, 207 F.3d 1303, 1333 (11th Cir. 2000).

(App., pp. 18a-19a). Accordingly, the district court entered its Amended Judgment in accordance with the jury's verdict on July 19, 2000. (Appendix E).

Petitioners timely appealed to the Eleventh Circuit Court of Appeals. On June 6, 2001, the Court of Appeals entered an Order affirming the judgment of the district court in its entirety. (Appendix B). In its decision, the court of appeals noted that Acey and Cooper were responsible for investigating claims of racial harassment and were not in the chain of command at the Big Creek facility. The court nevertheless cited as evidence of disparate treatment sufficient to support the jury's verdict that Acey was not disciplined[8] and that Cooper was disciplined less severely than Respondents. (App., pp. 11a-12a). As to the qualified immunity issue, the court of appeals accepted the district court's decision to strip Regus and Cooper of qualified immunity based solely upon the jury's determination that Regus and Cooper intentionally discriminated against Respondents. (App., p. 15a). Petitioners timely sought Rehearing En Banc, which request was denied on January 17, 2002. (Appendix A).

REASONS FOR GRANTING THE WRIT

For two reasons, certiorari should be granted to review the Eleventh Circuit's affirmance of the district court's judgment. *First*, there is a conflict among the courts of appeal as to the standard for a proper comparator in disparate discipline employment discrimination cases. In this case, the district court applied a "comparable seriousness" standard in determining that Cooper and Acey, who were not in the Public Works Department's chain of command and were not responsible for maintaining the work environment at Big Creek, were proper comparators to Respondents, who *were* responsible for the work environment at Big Creek. Other courts of appeal (including other panels of the Eleventh Circuit), however, have applied the far more stringent "nearly

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[8] There was no record evidence at trial and none cited by the court of appeals to suggest that Acey had engaged in any wrongdoing in connection with the Big Creek situation.

identical" standard to determine whether an employee is a proper comparator in the disparate discipline analysis. Moreover, other courts of appeal also have considered factors such as relative job responsibilities and record of discipline of the purported comparator, in addition to the nature and seriousness of the alleged misconduct, in determining whether an employee is a proper comparator to the plaintiff. As a result of this conflict, employment discrimination litigants in different judicial circuits will receive different outcomes under identical facts.

Second, in upholding the district court's decision to strip Regus and Cooper of qualified immunity, the Eleventh Circuit deviated from the relevant decisions of this Court as to the applicability of qualified immunity. While the district court purported to evaluate the two prongs of the qualified immunity analysis employed by this Court, the court's own opinion makes clear that its determination that Regus and Cooper violated clearly established law was premised entirely upon the jury's conclusion that Regus and Cooper intentionally discriminated against Respondents. The court thus abdicated its duty to decide qualified immunity as an issue of law and instead allowed the jury to resolve the issue. In addition, the evidence considered by the jury was wholly insufficient to support a finding that Regus and Cooper violated clearly established law as would permit the court to strip them of qualified immunity.

I. Certiorari Should Be Granted To Resolve A Conflict Among The Courts Of Appeal As To The Standard For Proper Comparators In Disparate Discipline Discrimination Cases.

In *McDonald v. Santa Fe Transportation Company*, 427 U.S. 273, 283-84 (1976), this Court held that a plaintiff may present, as circumstantial evidence of pretext in a disparate treatment case, evidence that he engaged in acts of "com-

parable seriousness" to those of a non-protected employee, yet was disciplined more severely. That case, however, presented a straightforward fact pattern in which three rank-and-file transportation employees all were involved in the same scheme to misappropriate company property. Because the two white employees were discharged, while the non-white employee was retained despite engaging in identical conduct, this Court held that the white employees could rely on the difference in treatment as circumstantial evidence of race-based discrimination. *Id.*

Not every case, however, presents the straightforward fact pattern found in *McDonald*. Perhaps as a result, the courts of appeal (and even panels within courts of appeal) have applied a wide variety of standards for proper comparators in disparate discipline employment discrimination cases. For example:

- In the Sixth Circuit, the court required a plaintiff to identify a comparator who was "similarly situated in all respects" but did not identify in what "respects" similarity was required. The court further held that the misconduct at issue must be the "same conduct without such differentiating or mitigative circumstances that would distinguish their conduct." *Clayton v. Meijer, Inc.*, No. 00-1970, 2002 U.S. App. LEXIS 2887, at *8-*10 (6th Cir., Feb. 26, 2002).
- In the Fifth Circuit, the court required a plaintiff to show that "the misconduct for which she was discharged was nearly identical to that engaged in by an employee not within her protected class whom the company retained." In other words, the court held, "the conduct is not nearly identical when the difference between the plaintiff's conduct and that of those alleged to be similarly situated accounts for the difference in treatment received from the employer." *Wallace v. Methodist Hosp. Sys.*, 271 F.3d 212, 221 (5th Cir. 2001).

- In the Eighth Circuit, the court required a plaintiff to show that she was "involved in or accused of the same offense" as a male comparator *and* that the discipline decisions were made by the same decision-makers. *Britton v. City of Poplar Bluff*, 244 F.3d 994, 998 (8th Cir. 2001).
- In the Seventh Circuit, the court required a plaintiff to point to a non-protected comparator who received preferential treatment who was "similarly situated in all respects," but did not define the term "respects." The court further held that the comparator must have engaged in misconduct of "comparable seriousness." *Spath v. Hayes Wheels Int'l*, 211 F.3d 392, 396 (7th Cir. 2000).
- In the Second Circuit, the court required a plaintiff to show only that his misconduct was of "comparable seriousness" to that of the non-protected comparator, but also required that the comparator be "subject to the same performance evaluation and discipline standards." *Graham v. Long Island R.R.*, 230 F.3d 34, 39-40 (2d Cir. 2000).
- In the Tenth Circuit, the court rejected a plaintiff's disparate treatment argument, holding that the purported comparator was not similarly situated even though he committed a similar offense because he was one of the plaintiff's supervisors. *Jones v. Denver Post Corp.*, 203 F.3d 748, 753 (10th Cir. 2000).
- In the First Circuit, the court required a plaintiff to show that his case and the comparator's case "must closely resemble one another in respect to relevant facts and circumstances." *Conward v. Cambridge Sch. Comm.*, 171 F.3d 12, 20 (1st Cir. 1999).
- In the Federal Circuit, the court required a plaintiff to show that "all of the relevant aspects of her employment situation were nearly identical to those" of the non-protected comparator. Accordingly, plaintiff could not rely on a male comparator who was less senior in

position than plaintiff and who was criticized for different work practices than plaintiff. *Neuren v. Adduci, Mastriani, Meeks & Schill*, 43 F.3d 1507, 1514 (D.C. Cir. 1995).

This divergence of standards is further demonstrated by decisions issued by separate panels within the Eleventh Circuit Court of Appeals around the time of the *Lambert* decision in the conflicting opinions of *Anderson v. WBMG-42*, 253 F.3d 561, 565 (11th Cir. 2001) (*citing Alexander v. Fulton County*, 207 F.3d 1303, 1333-34 (11th Cir. 2000) (Before Anderson, Chief Judge, Marcus, Circuit Judge, and Hancock, Senior District Judge)) (Before Barkett, Hill and Kravitch, Circuit Judges) and *Silvera v. Orange County Sch. Bd.*, 244 F.3d 1253, 1259 (11th Cir. 2001), *cert. denied*, ___ U.S. ___, 122 S. Ct. 402 (2001) (Before Carnes and Roney, Circuit Judges, and O'Kelley, District Judge). In *Anderson* and *Alexander*, the two separate panels defined a proper comparator as any employee who engaged in "similar" conduct and was treated more favorably. *See Anderson*, 253 F.3d at 565, and *Alexander*, 207 F.3d at 1333. By contrast, the *Silvera* panel defined a proper comparator as any employee who engaged in "nearly identical" conduct and was treated more favorably. *Silvera*, 244 F.3d at 1259.[9]

In the instant case, the court permitted the jury to consider the treatment of Acey and Cooper as evidence of disparate treatment if they found Acey or Cooper to have engaged in misconduct that was "nearly identical or of comparable seriousness" to Respondents. (App., pp. 18a-19a). The factual predicate for this comparison does not exist. It was undisputed at trial that neither Acey nor Cooper were in the

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[9] In fact, the *Anderson* and *Alexander* panels *explicitly rejected* the "nearly identical" standard applied in the *Silvera* decision by another panel of the Eleventh Circuit during the same time period. *Compare Anderson*, 253 F.3d at 565, and *Alexander*, 207 F.3d at 1333, *with Silvera*, 244 F.3d at 1259.

chain of command at the Big Creek facility or were charged with maintaining a non-discriminatory work environment. The court nevertheless permitted the jury to compare their conduct to that of Respondents simply because they participated in the Big Creek investigation. Had the court considered the requirements imposed in other judicial circuits that comparators be similarly situated in all relevant respects, such as having the same supervisor or being subject to the same performance evaluation standards, Petitioners would have prevailed, because the differences in supervisors and job duties and responsibilities were undisputed at trial. Morever, even if the court had only evaluated the nature of the misconduct (and not considered the other factors mentioned previously) using the more stringent "nearly identical standard" rather than the "comparable seriousness" standard, Petitioners would have prevailed, because it was undisputed at trial that Petitioners were disciplined for their inaction at Big Creek, while Cooper and Acey were charged only with investigating the Big Creek situation after the fact. In short, had this lawsuit been brought in another jurisdiction, Respondents' evidence would have been subject to more stringent standards, which would have compelled a favorable outcome for Petitioners.

A conflict among the courts of appeal in the application of an important—and common—question of employment discrimination law such as this one is precisely the type of issue certiorari review was intended to resolve. Sup. Ct. R. 10. Accordingly, Petitioners respectfully submit that the Petition should be granted so that the Court may identify and define the factors to be considered by lower courts in evaluating disparate discipline cases.

II. Certiorari Should Be Granted To Correct The Eleventh Circuit's Deviation From The Standard For Qualified Immunity Established By This Court.

As this Court has established, the affirmative defense of qualified immunity provides that "government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). Only those individuals who are plainly incompetent or knowingly violate the law will be stripped of immunity. *Malley v. Briggs*, 475 U.S. 335, 341 (1986). Thus, in performing their duties, government officials are not required to err on the side of caution. *Davis v. Scherer*, 468 U.S. 183, 196 (1984).

Because it was uncontroverted at trial that Regus and Cooper each acted within the scope of his discretionary authority, the district court and court of appeals needed only to determine whether Respondents showed by a preponderance of the evidence that Regus' and Cooper's official acts violated law that was clearly established at the time they acted. *Evans v. Hightower*, 117 F.3d 1318, 1320 (11th Cir. 1997). In addition, because there was no factual dispute as to the actions taken by Regus and Cooper in their discretionary authority (*e.g.*, Regus disciplined Respondents; Cooper included incomplete and erroneous information in his report) and even Respondents agreed that Regus' disciplinary letters were factually accurate, the court should have decided the qualified immunity issue as a matter of law. *See, e.g., Hunter v. Bryant*, 502 U.S. 224, 227-28 (1991) (issue of qualified immunity should be decided by the court, and not submitted to the jury). In upholding the district court's decision, the court of appeals explicitly approved of this practice, citing only to its decision in another qualified immunity case.

(App., p. 15a) (*citing Alexander*, and holding that the district court properly denied Regus and Cooper qualified immunity on the basis of the jury's determination by special interrogatory that Regus and Cooper intentionally discriminated against Respondents). Because the court of appeals clearly deviated from the well-settled qualified immunity standards established by the relevant decisions of this Court, certiorari should be granted and the holding of the court of appeals reversed.

Moreover, even if the qualified immunity question *were* theoretically permitted to be submitted to the jury, the court erred in denying Petitioners' motion for judgment as a matter of law as to qualified immunity because the undisputed evidence at trial demonstrated that Regus and Cooper did not violate clearly established law.

A. Defendant Regus

Respondents failed to produce any evidence that Regus disciplined them on the basis of their race. Instead, Regus testified that he disciplined Petitioners because they were the managers responsible for maintaining a healthy working environment at Big Creek but failed to adequately address the racially hostile environment that each Respondent acknowledged existed. Significantly, two of the Respondents conceded at trial that Regus' discipline letters were factually accurate, although Respondents disagreed with the conclusion that they should be disciplined. Because neither 42 U.S.C. § 1983 nor § 1981 are "fairness" statutes pursuant to which employees may recover for decisions with which they simply disagree, this testimony is in itself sufficient to neutralize Respondents' claims of illegal race discrimination.

As set forth previously, the "evidence" of race discrimination upon which Respondents relied was insufficient to raise a question as to whether Regus and Cooper violated the law. Regus explained the reasons for his disciplinary deci-

sions with respect to Cooper, Acey and Brown,[10] and Respondents did not offer any evidence to contradict his testimony. Regus also testified that he recognized the problems with Cooper's report and, as such, did not rely on it in determining whether and to what extent to discipline Respondents. This testimony was corroborated by Personnel Director Brandes.[11] Finally, three of the individuals present at the May 15 meeting (Regus, Cooper and Brandes) testified that in context, Cooper's comment to Bockman about seeing the situation from a black man's perspective clearly was intended to get Bockman to move off his position that Parker and Glass were drug dealers and instead focus on the hostile work environment that existed at Big Creek. Respondents, who were not present at the meeting, did not present any evidence to the contrary. In short, the evidence at trial showed that Regus acted reasonably given the facts presented to him and that he did not intentionally violate the law.

B. Defendant Cooper

Likewise, Cooper's conduct shows that he did not intentionally violate the law, and that he acted reasonably given the facts presented to him. That two independent bodies—the Personnel Board and the EEOC—concluded that a hostile working environment existed at Big Creek and that Respondents' discipline was job related supports the reasonableness of Cooper's conclusions. Thus, the conclusions reached by

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[10] Again, although Respondents point to evidence that Brown was aware of and did not report employees' use of drugs, alcohol and racial slurs, Regus' unrebutted testimony shows that he was unaware of this when he made his disciplinary decisions.

[11] In an effort to prove that Regus did rely on Cooper's report in disciplining them, Respondents focused heavily on the fact that Respondents were disciplined under those provisions of the Fulton County regulations that Cooper identified in his report. However, Brandes, who as Personnel Director is intimately knowledgeable about the regulations, testified that he assisted Regus in making this determination.

Cooper cannot support a finding that race motivated his investigation and report.[12]

First, as set forth previously, Cooper's comment at the May 15, 1996, meeting reflected his desire that Bockman view the situation from the perspective of the African American Big Creek employees. Second, although Cooper did not specifically direct Bockman's attention to the tape of Brown's interview (wherein he admitted knowledge of employees' use of drugs and racial slurs), Cooper testified that he did not do so because Brown told him he believed his hands were tied with respect to disciplining those employees and, thus, Cooper did not think that Brown himself should be disciplined. Therefore, given the facts available to Cooper at the time of his report, he acted reasonably and is entitled to qualified immunity.

Accordingly, because the court improperly allowed the question of qualified immunity to be answered by the jury when no factual disputes regarding Petitioners' conduct existed, and because the evidence supported a finding that Regus and Cooper acted reasonably based upon the facts known to them, the Court should grant the Petition and reverse the decision of the court of appeals.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

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[12]Respondents also pointed to the fact that Cooper listed the race of the individuals in his report. This is simply a red herring which does not evidence racial bias given that Cooper's report dealt with complaints of racial harassment and, logically, included the races of the alleged victims, those in charge and those accused of the harassing conduct.

Respectfully submitted,

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